SUPREME COURT
NOV 2002



STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Donald E. Holbrook, Jr., Presiding Judge

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellant,

vs.

MARK DREW PERKINS,

Defendant/Appellee.

_____/

Docket No. 120453
Court of Appeals No. 229111
Bay County CC No. 00-1112-FS
Bay County DC No. 99-4349-FY

# BRIEF ON APPEAL – DEFENDANT/APPELLEE

(Oral Argument Requested)

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## STATEMENT OF THE BASIS OF JURISDICTION OF THE MICHIGAN SUPREME COURT

The Michigan Supreme Court granted Appellant's application for leave to appeal from that part of the Court of Appeals Opinion dated June 8, 2001 (211a-215a), determining that the issue of the dismissal of a felony firearm charge connected to a dismissed CSC I charge was abandoned on appeal and affirming the Circuit Court's dismissal of a misconduct in office charge and connected felony firearm charge in its Order entered in this case on May 7, 2002, 217a. In the Court of Appeals, Appellant had appealed Bay County Circuit Court Judge Kenneth A. Schmidt's Order granting Appellee's motion to quash bind-over on a charge of misconduct in office, MCLA 750.505; MSA 28.773 and denying Appellant's motion to amend the information to reinstate the CSC I charge, 201a-209a. The Court of Appeals panel held that the Examining Magistrate abused his discretion in not binding Appellee over on a charge of CSC I, but affirmed the Circuit Court's dismissal of the misconduct in office charge and related felony-firearm charge.

## COUNTER-STATEMENT OF FACTS

Appellee was originally charged in a warrant authorized on June 18, 1999 with having committed four felony offenses on July 4, 1993:

> Count I - CSC I, MCLA 750.520b(1)(f); MSA 27.788(2)(1)(f), engaging in sexual penetration with another person, fellatio, causing personal injury to the victim and using force or coercion to accomplish the sexual penetration.
>
> Count II - Felony Firearm, MCLA 750.227(b); MSA 28.424(2), having a pistol in his possession at the time he committed CSC I.
>
> Count III - Misconduct in office, a common law offense, MCLA 750.505; MSA 28.773.

- and -

Count IV - Felony Firearm, MCLA 750.227(b); MSA 28.424(2), having a pistol in his possession at the time he committed misconduct in office.

See Supplemental Appendix, pps. 3dsa-5dsa.

Following preliminary examination, the Examining Magistrate denied Appellant's motion to bind Appellee over on a charge of CSC I, 192a-198a. He bound Appellee over on the misconduct in office and related felony firearm charges, 198a-200a. The Circuit Court later granted Appellee's motion to quash the information charging him with misconduct in office and felony firearm, and denied Appellant's motion to amend the information seeking to reinstate the first degree criminal sexual conduct and felony firearm charges, 201a-209a.

The CSC I charge is not at issue in this Prosecutor's appeal. The Court of Appeals panel affirmed the Circuit Court's dismissal of the misconduct in office and related felony-firearm charge in its June 8, 2001 unpublished Opinion, 214a-215a. It considered the dismissal of the felony-firearm charge related to the CSC I charge abandoned on appeal since Appellant did not raise or argue that the District Court erred in dismissing that charge, 212a, f.1.

Only two witnesses testified at the preliminary examination in this case – the Complainant and psychologist Rosemary Jalovaara. Both of these witnesses were called by Appellant. Appellee did not present any proofs.

Appellant, over Appellee's objection (12a, 14a-19a), elicited testimony from Complainant about her relationship with Appellee in support of a subjugation theory to the effect that due to her relationship with him, she was unable to resist his invitation for sexual contact. Complainant testified that she had known Appellee and his family since she was 12 years-old, 11a. She testified that she was comfortable with his family, 11a. She testified that she often spent the night

at his house, 11a. She testified that she considered herself part of his family, 11a-12a. She testified that she looked up to Appellee as a father figure, 13a. She testified that she knew he was a police officer which made her feel fine and safe, 13a. She testified that she used to do things with him like go to the shooting range, 33a-34a. She testified that she used to go with the family to the Perkins' family cabin, 37a. She testified that Appellee attended her basketball games, 42a. She testified that she and Appellee took statistics for her high school football team, 44a. She testified that she felt comfortable with Appellee as an individual, 66a. She testified that she put Appellee "on a pedestal of my father" (72a). She testified that he had told her he wanted to marry her, 86a. She testified that she believed she was in love with him and that he was in love with her, 89a. She testified that most of the time when the two had sex, she wanted it just as much as he did, 91a. She testified that she believed that some day he would marry her, 93a. In reply to a question posed by the Examining Magistrate, she testified that she had the hope that she and Appellee would eventually get married, 111a. She testified that talk of marriage between her and Appellee began as far back as she could remember, 116a.

In reply to a series of cross-examination questions to determine whether there was anything about Appellee's employment status as a deputy sheriff which, somehow, caused Complainant to engage in sex acts with Appellee, Complainant testified that Appellee was never in a position where he had legal authority over her, 73a. She testified that he had never arrested her, 71a. She testified that he never took her into custody, 72a. She testified that she did not meet him through his line of work, 72a. She testified that she knew his family socially, 72a. She testified that she never met him in circumstances where she was either a victim or was accused of a crime, 73a. She testified that she never had any dealings with him in the line of his work, 73a.

She testified that on the morning of Sunday, July 4, 1993, when she was 16 years-old, following her return from a month-long trip to Mexico, she telephoned Appellee and left a voice mail message for him, (54a-55a, 80a-82a). He telephoned her back and asked her to meet him behind Euclid Tool Company in an industrial park off of Mackinaw Road, (55a, 80a-82a). She testified that she and Appellee were having an affair at the time, 79a. She testified that she and Appellee were lovers, (89a, 93a). She testified that at this time she knew she could end the relationship and that Appellee was not in a position of authority over her, (75a, 77a-79a). She testified that she agreed to meet Appellee, a Bay County deputy sheriff, knowing that he was on duty, in a patrol car, in uniform, armed with a handgun and that she would engage in sex with him, (81a-82a, 113a). She drove from her home in Auburn to the meeting place, a 10-minute drive, 83a. She got out of her car and got into Appellee's patrol vehicle, (56a, 84a). Once inside the patrol vehicle, the two hugged each other, 85a. They talked about her trip to Mexico, 85a-86a. Then, she performed oral sex on him, (56a, 86a).

Complainant testified that Appellee did not pressure her in any way into meeting with him, 84a. She testified that she agreed to perform oral sex on Appellee freely and voluntarily, (87a-88a, 92a). She testified that Appellee did not use physical force or physical violence against her, 88a. He did not threaten her in any manner, 89a. He did not overcome her through concealment, or by the element of surprise; in fact, she specifically testified in answer to a question by the Court that she knew when she left her home in Auburn that she would probably engage in sex with Appellee at the meeting place, 113a.

In rendering his decision on Appellant's motion for bind-over on the CSC I and connected felony firearm charges following preliminary examination, the Examining Magistrate noted that the testimony in the case was uncontroverted, 192a. He determined that a subjugation theory is,

in fact, a proper theory, 193a. He stated that Appellant appeared to rely on three bases to establish its subjugation theory: first, that Appellee was a police officer; second, that at one point, he was an assistant coach on a team Complainant was on; and, third, that he was a father figure to her, 193a-194a.

As to the first and second bases of Appellant's subjugation theory, the Examining Magistrate noted:

> ". . . there has been no indication shown to the Court that at the time of the offense in 1993 that the defendant was in any way acting through any pressure or belief that if she failed to give sexual – perform sexual acts to the – on the defendant that he would somehow act in his capacity as a police officer or that she was in any way intimidated or threatened by the status of his being a police officer at that time. Also as to the assistant coach, for want of a better word, role of the defendant, this was tenuous at best and I believe was maybe one or two isolated occurrences. And there certainly is no showing again that by 1993 if in fact the defendant was acting in that capacity that this in any way affected the mental state of the victim or to cause her to come under any kind of pressure or authority or a subjugation theory." (194a)

The Examining Magistrate recognized that the thrust of Appellant's argument was that the Complainant having been engaged at a young age in a sexual relationship over a long period of time rendered her subjugated to Appellee's requests for sexual favors to the extent that she did not have the ability to refuse them, 194a. The Examining Magistrate stated:

> ". . . the question the court must address is the state of the mind and the status of the parties at the time of the offense in context with the earlier acts.
>
> The court is simply not convinced that the people have established probable cause to believe that the offense charged has been committed in this regard. Although certainly the victim had a relationship with the defendant as of the date of the offense, the Court notes several factors that it considered in its opinion. First of all, this was the last sexual encounter with the defendant; the age of the victim; the victim and the defendant were not living together or

> seeing each other on a regular basis as they had been; the victim was at home living with her mother at the time. The meeting on the date of offense was entirely voluntary on the victim's part; the parties having been separated for some period of time, somebody was on a vacation. I don't really recall who. The victim had on at least one prior occasion had tried to break off the relationship with the defendant but in the opinion of the court one of the reasons why she continued the relationship was she was in fact hoping that the defendant might leave his wife and marry her." (195a-196a)

As to the CSC I and connected felony firearm charges, the Examining Magistrate concluded:

> ". . . the Court is simply not able to determine that the People have shown probable cause that the victim's free will was so overcome by the past acts of the defendant or their relationship that she was unable to resist the invitation for sexual contact. . . ." (198a)

As to the misconduct in office and connected felony firearm charges, the Examining Magistrate first noted, correctly, that the conduct must be in the exercise of the duties of office, or done under the color of office, 198a-199a. The Court decided to bind Appellee over on those charges, citing the following reasons:

> ". . . the acts complained of on July 4th occurred in a marked police car, with the Defendant in full uniform and on duty at the time and in a public place. . . ." (200a)

In his Order granting Appellee's motion to quash the misconduct in office and connected felony firearm charges, the Circuit Court cited *People v. Carlin (on remand),* 239 Mich App 49 (1999) for the proposition that one of the elements of the common-law offense of misconduct in office is that the conduct must be in the exercise of the duties of the office or done under the color of the office. The Circuit Court stated:

> ". . . The District Court was aware that, in addition to other elements of the crime, the charged conduct must be committed 'in the exercise of the duties of the office' or 'under the color of the office'.

However, the District Court did not explain how (if at all) the sexual act between Defendant and the 16-year old victim on the date charged related to Defendant's exercise of his deputy sheriff's duties, or how (if at all) this act was performed under color of Defendant's office. The fact that the charged conduct took place in a marked police car, with Defendant in full uniform and on duty at the time, and in a public place - evidence which might be significant in other cases where a police officer uses the authority of his office to achieve private gain or personal gratification - is not dispositive in this case, considering the other evidence admitted at the preliminary examination.

Before ruling on the misconduct in office charge, the District Court had already concluded, concerning the Prosecutor's criminal sexual conduct subjugation theory, that Defendant's status as a police officer did not cause the victim to submit to Defendant, or to feel threatened or intimidated by him in any way. Indeed, the evidence supported this finding. The victim's relationship to Defendant was personal, originating with Defendant's wife, basketball coaching, babysitting, and a close relationship with Defendant's family. The victim testified that she viewed Defendant as 'the father I never had in my life', and that she felt 'fine' and 'safe' knowing he was a police officer. Thus, the District Court properly determined that Defendant's role or activities as a deputy sheriff did not supply the force or coercion necessary to support the criminal sexual conduct charge.

The same evidence which supported the District Court's finding as to a lack of force or coercion resulting from Defendant's police officer status demonstrates that the District Court's bind-over of Defendant on the charge of official misconduct was an abuse of discretion. The evidence showed that Defendant's conduct with the victim on the date charged was unrelated to his police officer occupation or his official duties as a deputy sheriff. Although it occurred while Defendant was on duty, it was not in any way a result of or accomplished by Defendant's position, powers, or responsibilities as a deputy. As the Supreme Court held in *Coutu* and *Carlin*, as the Court of Appeals held in *Carlin (on remand)* and as the District Court correctly acknowledged in this case, to be criminally actionable as misconduct in office the charged conduct must arise out of performance or exercise of official duties, or be done under color of the office.

Because Defendant's sexual conduct with the victim on the date charged did not arise out of performance or exercise of his official

> duties as a deputy sheriff, and was not accomplished under color of his office, it did not constitute official misconduct. Considering the facts upon which the District Court acted, there was no justification or excuse for the District Court's ruling, and that ruling must be set aside as an abuse of discretion." (206a-207a)

In affirming the Circuit Court's decision regarding the misconduct in office and connected felony firearm charge, the Court of Appeals stated:

> ". . . The evidence in record (*sic*) does not establish that Defendant is a public officer for purposes of the misconduct in office charge, because the complained of behavior did not relate in any way to his position as a deputy sheriff. *People v. Coutu*, 459 Mich 348, 358; 589 NW2d 458 (1999). Further, the evidence presented does not establish that the behavior at issue occurred 'in the exercise of the duties of the office or done under the color of the office' with no showing that the underlying felony was committed, the felony-firearm charge also fails." (214a-215a).

## I.

## QUESTION PRESENTED

Under relevant principles of appellate law, is the issue of whether the District Court erred in dismissing the felony-firearm charge related to the CSC I charge deemed waived or abandoned in this case where Plaintiff/Appellant never raised the issue in its Court of Appeals brief, never argued the point in the body of its brief and never argued about the issue at oral argument?

## ARGUMENT

UNDER RELEVANT PRINCIPLES OF APPELLATE LAW, THE ISSUE OF WHETHER THE DISTRICT COURT ERRED IN DISMISSING THE FELONY-FIREARM CHARGE RELATED TO THE CSC I CHARGE IS DEEMED WAIVED OR ABANDONED IN THIS CASE WHERE PLAINTIFF/APPELLANT NEVER RAISED THE ISSUE IN ITS COURT OF APPEALS BRIEF, NEVER ARGUED THE POINT IN THE BODY OF ITS BRIEF AND NEVER ARGUED ABOUT THE ISSUE AT ORAL ARGUMENT.

## DISCUSSION

In its brief filed in the Court of Appeals, Appellant never raised the issue of whether the District Court erred in dismissing the felony-firearm charge related to the CSC I charge. It never argued the point in the body of its brief. Likewise, it never argued about the issue at oral argument. Under relevant principles of appellate law, the issue is deemed waived or abandoned.

Appellee agrees that the standard of review for a question of law is *de novo* review.

In *People v. McMiller*, 202 Mich App 82, 83, n1 (1993), the Court of Appeals panel stated that the issue whether a CCW with unlawful intent charge could be reinstated following dismissal by the Circuit Court had been abandoned on appeal where the prosecution had failed to raise the issue in its statement of issues presented.

In *People v. Yarborough*, 183 Mich App 163, 165 (1990), the Court of Appeals panel stated that the issue whether the prosecutor improperly cross-examined Defendant concerning a prior arrest which did not result in conviction was, likewise, not preserved for appeal because it was not raised in the Defendant's statement of issues presented.

In *People v. Kent*, 194 Mich App 206, 209-210 (1992), where Defendant had failed to raise the issue of whether the trial court erred in denying his motion to dismiss charges because of delay in arrest in any of the three briefs filed by him in his appeal, the Court of Appeals panel deemed the issue abandoned.

In *Midland v. Helger Construction Co.*, 157 Mich App 736, 745 (1987), the Court of Appeals panel declined to consider Plaintiff's argument that the Circuit Court erred in granting summary judgment on the City's breach of warranty claim where Plaintiff had made that claim in the title to its second issue on appeal, but did not argue the point in the body of its brief. The Court of Appeals panel concluded that the issue had been waived.

The cases cited in Appellant's appeal brief are inapplicable to the issue of whether it properly placed before the Court of Appeals the issue of the District Court's dismissal of the felony-firearm charge related to the CSC I charge. The reference to *People v. Gilbert*, 414 Mich 191 (1982), a radar detector case, comes from a footnote in the dissenting Opinion where the author was citing as an example that the mere carrying of a concealed dangerous weapon is unlawful. *People v. Hunt*, 442 Mich 359 (1993) was a case where the Michigan Supreme Court peremptorily reversed a refusal to allow a proposed amendment at the end of a preliminary examination to add a charge of CSC III. *People v. Fortson*, 202 Mich App 13, 15-17 (1993) was a case where the Court of Appeals upheld a trial court's decision to allow the prosecution to add a felony firearm count four months after the Defendant had been bound over for Circuit Court trial even though Defendant had never been bound over on the charge or even had a preliminary examination on it. *People v. Elowe*, 85 Mich App 744, 747-748 (1978) stated that the felony-firearm statute does not impose any requirement of a nexus between the felony and the firearm. None of these cases has anything whatever to do with properly placing an issue for consideration by the Court of Appeals, or waiver or abandonment of an issue on appeal.

A case cited by Appellant that comes closest to being relevant is *People v. Stoll*, 87 Mich App 595, 597 (1978), an appeal from a plea-based conviction of delivery of phencyclidine, assault with intent to commit murder and possession of a firearm during commission of a felony where the prosecution conceded that an adequate factual basis for the assault with intent to commit murder plea had not been established at plea proceedings. The Court of Appeals in *Stoll, supra*, stated that the firearm offense had to be remanded since it turned upon the establishment of the assault offense. *Stoll* is clearly distinguishable from the case at bar because the felony firearm charge was, in fact, before the Court of Appeals. In the instant case, the prosecutor never

properly placed the matter before the Court of Appeals panel for its consideration. Accordingly, the issue should be deemed waived or abandoned.

## II.

## QUESTION PRESENTED

Does the conduct alleged to establish the common law offense of misconduct in office fall within the scope of that offense?

## ARGUMENT

THE ALLEGED CONDUCT DOES NOT FALL WITHIN THE SCOPE OF THE COMMON LAW OFFENSE OF MISCONDUCT IN OFFICE.

## DISCUSSION

Generally, an examining magistrate's decision to bind over a Defendant is subject to review for abuse of discretion, *People v. Thomas*, 438 Mich 448, 452 (1991). This general proposition contemplates a review of the factual sufficiency of the evidence against the Defendant, *Thomas, supra*, p. 452. The decision whether alleged criminal conduct falls within the scope of a criminal law involves a question of law that is reviewed *de novo, People v. Hamblin*, 224 Mich App 87, 91 (1997). Where there is *de novo* review, the reviewing court gives no deference to the trial court and views the case with fresh eyes, *Fletcher v. Fletcher*, 200 Mich App 505, 512 (1993). The determination whether Appellee should be considered a public officer for purposes of a misconduct in office charge is a question of law that is reviewed *de novo, People v. Coutu and Carlin*, 459 Mich 348, 353 (1999).

In the case at bar, one of the elements of the common law offense of misconduct in office is that the Appellee is a public officer, *People v. Carlin* (on remand), 239 Mich App 49, 64 (1999). The determination whether a deputy sheriff is a public official is dependant upon the legal

context in which it arises, *Coutu and Carlin, supra*, p. 357. The same officeholder may be an officer of the state for one purpose and not for another, *Coutu and Carlin, supra*, p. 358. Clearly, the determination whether Appellee was a public officer at times relevant to this case is a question of law, reviewable *de novo*.

Misconduct in office is a common law offense which involves corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office, *Coutu and Carlin, supra*, p. 354.

The elements of misconduct in office are: 1) the person is a public officer; 2) the conduct must be in the exercise of the duties of his office or done under the color of his office; 3) the acts were malfeasance or misfeasance; and, 4) the acts must be corrupt behavior, *Carlin* (on remand), *supra*, p. 64.

> "The criminal charge of misconduct in office occurs:
>
> > When duties imposed by law have not been properly and faithfully discharged, and is established by showing the willful violation of a prescribed duty. The exercise of a duty owed to the public is essential, for otherwise the offending behavior becomes merely the private misconduct of one who happens to be an official. [Am Jur 2d Public Officers and Employees, § 412]
>
> In order to find a public officer guilty of malfeasance, there must be established a 'breach of a positive statutory duty' or 'the performance of a discretionary act with an improper or corrupt motive.' Am Jur 2d, *supra*, § 409." *Carlin* (on remand) *supra*, pps. 65-66.

Whether a deputy sheriff is a public officer is dependant upon the legal context in which his conduct is considered, *Coutu and Carlin, supra*, p. 357. A deputy sheriff is a public officer for purposes of misconduct in office charges where the allegations made against him arise from the performance of his official duties, *Coutu and Carlin, supra*, pps. 357-358.

The defendant Coutu and others, deputy sheriffs with the Oakland County Sheriff's Department, were accused of affording work-release inmates preferential treatment in exchange for gifts and favors. The defendant Carlin, a captain with the Oakland County Sheriff's Department, was accused of having misrepresented overtime hours in order to ingratiate himself with Rochester Hills City officials and, also, with having ordered deputies to chauffeur prominent Oakland County officials to various locations.

In *Coutu and Carlin, supra*, all of the allegations supporting all charges arose from the performance of the deputies' official duties. The act of fellatio in this case did not arise from Appellee's status as a deputy. An act of fellatio is not in any manner, shape or form dependent upon Appellee being a deputy. It is an act that can be performed by anyone who is not a deputy and performed on any male who is not a deputy. It could have been performed when he was off-duty. There is no evidence in this case that the act was performed as a *quid pro quo* in exchange for some favor that a sheriff's deputy could bestow by virtue of the power of his office. The evidence in this case showed that Appellee's status as a police officer did not cause Complainant to submit to him, or to feel threatened or intimidated by him in any way. The evidence showed that Complainant's relationship to Appellee was personal, commencing when Appellee's wife coached Complainant's basketball team, followed by babysitting and, ultimately, a close relationship with Appellee's family. The Complainant testified that she viewed Appellee as "the father I never had in my life," (13a) and that she felt "fine" and "safe" knowing he was a police officer, 13a. The Examining Magistrate concluded that Appellee's status as a deputy sheriff did not supply the force or coercion element of the criminal sexual conduct charge, 193a-194a. The same evidence which supported the conclusion that Appellee's status as a deputy did not supply the force or coercion element of the CSC I charge demonstrates that his activities with her on the

date of offense were totally unrelated to his being a police officer. There is no evidence in this case of corrupt conduct which arose from the performance of Appellee's official duties. There is no evidence in this case of *official misconduct*. The evidence supports, at most, an allegation of *private misconduct* while at work. The alleged conduct simply does not fall within the scope of the common law offense of misconduct in office. The misconduct in office charge should be dismissed.

In *Coutu and Carlin, supra*, pps. 358-359, the Michigan Supreme Court determined that deputy sheriffs are public officials for purposes of the misconduct in office offense when the allegations supporting charges against them arose from the performance of their duties. The Court concluded that those defendants were public officials for purposes of the misconduct in office offense because it was absolutely clear that the charges arose, in the one instance, from the performance of duties with the Oakland County Sheriff's Department work release facility and, in the other instance, from the performance of command duties at the Rochester Hills substation. The court clearly recognized that an officeholder may be an officer of the state for one purpose and not for another. The misconduct in office charge contemplates evidence of *official* corruption.

> ". . . 'Official misconduct' is defined in Black's Law Dictionary (4th Ed.), p. 1236, as 'Any unlawful behavior by a public officer in relation to the duties of his office, willful in its character, including any willful or corrupt failure, refusal, or neglect of an officer to perform any duty enjoined on him by law.' (Citations omitted).
>
> > 'It must be something which in a material way affects the rights and interests of the public. (Citation omitted).
> >
> > '. . . the misconduct which shall warrant a removal of the officer must be such as affects his performance of his duties as an officer and not such only as affects his character as a private individual.' (Citations omitted).

> 'It must be a cause relating to and affecting the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The eccentric manner of an officer, his having an exaggerated notion of his own importance, indulgence in coarse language or talking loudly on the streets, however offensive, will not warrant any interference with his incumbency.' " *Krajewski v. City of Royal Oak*, 126 Mich App 695, 697-698 (1983).

In the case at bar, the complained-of act of fellatio is not a form of official corruption. The act did not arise from the performance of official duties. The act was not performed as a *quid pro quo* in exchange for an official favor. The act was not performed as the result of intimidation due to Appellee being a sheriff's deputy. The Examining Magistrate recognized this in denying Appellant's motion for a bind-over on the criminal sexual conduct charge. The act was totally unrelated to official duties. In denying Appellant's bind-over motion on the criminal sexual conduct charge, the Examining Magistrate determined that the act itself was not even a crime.

The preliminary examination evidence clearly showed that the relationship between Appellee and the Complainant was, at all relevant times, personal. The complained-of act arose out of that personal relationship; not, in any manner, shape or form, out of Appellee's status as a police officer. The Examining Magistrate clearly recognized this in his comments made in denying Appellant's motion for a bind-over on the criminal sexual conduct charge. There is, accordingly, no justification or excuse for his having bound Appellee over on a charge of misconduct in office based on such a preliminary examination record. The Examining Magistrate clearly abused his discretion. That part of the Court of Appeals' decision affirming the Circuit Court's order quashing the information should be affirmed.

## RELIEF REQUESTED

Appellee requests entry of an order affirming that part of the Court of Appeals' decision affirming the Circuit Court's order quashing the information and granting such other and further relief as shall be agreeable to equity and good conscience.

DATED: This 18th day of July, 2002.

DARBEE, BOSCO & HAMMOND, P.C.

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